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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

In re MARISSA E. et al., Persons Coming Under the Juvenile Court Law.	B172910 (Los Angeles County Super. Ct. No. CK48867)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. JAMIE S., Defendant and Appellant.	

APPEAL from an order of the Superior Court of Los Angeles County. Margaret S. Henry, Judge. Affirmed in part and reversed in part with directions.

Judy Weissberg-Ortiz, under appointment by the Court of Appeal, for Defendant and Appellant.

Office of the County Counsel, Larry Cory, Assistant County Counsel, and Kristine Miles, Senior Deputy County Counsel, for Plaintiff and Respondent.

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Jamie S. (Mother), the mother of Marissa E. (born in July 2000) and Sausha S. (born in August 2001), appeals from a December 18, 2003 order terminating her parental rights under Welfare and Institutions Code section 366.26 and freeing the children for adoption. (Unless otherwise stated, further statutory references are to the Welf. & Inst. Code.) We disagree with Mother's contention that the juvenile court's rejection of the "beneficial relationship" exception to termination of parental rights (§ 366.26, subd. (c)(1)(A)) was not supported by substantial evidence. But as argued by Mother and conceded by respondent Los Angeles County Department of Children and Family Services (DCFS), DCFS failed to comply with the notice requirements of the Indian Child Welfare Act (25 U.S.C. §§ 1901–1952) (hereinafter ICWA). Accordingly, the order is conditionally reversed and remanded with directions to the juvenile court to conduct further proceedings to establish compliance with the ICWA.

FACTUAL AND PROCEDURAL BACKGROUND

Marissa and Sausha were detained in April 2002 after DCFS received information from people at a motel where Mother was residing that the children were left alone without adequate adult supervision. On May 3, 2002, both children were placed in the same foster home, where they remained throughout these proceedings. The foster parents, the L.'s, expressed an interest in adopting both Marissa and Sausha and the L.'s were eventually granted de facto parent status and their adoptive home study was approved.[1]

On May 21, 2002, the court sustained a petition against Mother under section 300, subdivision (b) (failure to supervise and protect), and on July 8, 2002, the court ordered the children removed from the parents' custody and suitably placed. The court-ordered

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[1] Sausha's presumed father, Nikkolo S., visited Sausha only once after she was detained and he did not appeal from the termination of his parental rights. Clarence G., a parolee living in Illinois, was found to be the presumed father of Marissa, but her Tennessee birth certificate listed Joseph E. as her father. Neither Clarence G. nor Joseph E. visited Marissa or appeared in this proceeding.

case plan required Mother to enroll in parenting classes and individual counseling, and afforded her monitored visitation. In October 2002, when Mother was about five months pregnant, Mother moved to Illinois. Between May 2002 and December 2003, she had only one visit with her children, in January 2003. The foster father reported that at the time of the January 2003 visit the children did not recognize Mother. In Illinois, Mother regularly attended individual counseling from December 2002 through April 2003, but as of June 2003 she had not enrolled in parenting classes.

In April 2003, the juvenile court found that Mother was not in compliance with the case plan, terminated reunification services, and set the matter for a permanent plan hearing. Mother's counsel, but not Mother, appeared at the December 18, 2003 permanent plan hearing, when the court found it likely the children will be adopted and terminated parental rights. Mother appealed from the December 18, 2003 order.

DISCUSSION

A. Beneficial Relationship Exception to Termination of Parental Rights

Section 366.26, subdivision (c)(1)(A), affords an exception to termination of parental rights if "[t]he parents . . . have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship." (§ 366.26, subd. (c)(1)(A).) A beneficial relationship is defined as one that promotes the well-being of the child to such a degree as to outweigh the well-being the child gains in a permanent home with adoptive parents. (*In re Autumn H*. (1994) 27 Cal.App.4th 567, 575.) The existence of the relationship is determined by the age of the child, the portion of the child's life spent in the parent's custody, the positive or negative effect of interaction between the parent and child, and the child's particular needs. (*Id*. at p. 576; *In re Amber M.* (2002) 103 Cal.App.4th 681, 689.) The parent has the burden of establishing the existence of the beneficial relationship exception to termination of parental rights. (*In re Lorenzo C.* (1997) 54 Cal.App.4th 1330, 1343.) We review the juvenile court's findings regarding this exception under the substantial evidence test. (See, e.g., *In re Autumn H.*, *supra*, 27 Cal.App.4th at pp. 575–576.)

The juvenile court's implied finding that Mother failed to establish the beneficial relationship exception to termination of parental rights by not maintaining regular visitation is supported by substantial evidence. Between May 2002 and December 2003, Marissa and Sausha had seen Mother only once, in January 2003, when they did not appear to recognize her. Not having any bond or relationship with Mother, the children cannot be said to derive any benefit from continuing such a relationship. Accordingly, substantial evidence supports the juvenile court's implied finding that any benefits of continued parental contact are outweighed by the well-being the children gain by adoption.

But because there was no compliance with the notice requirements of the ICWA, a point conceded by DCFS, the December 18, 2003 order must be reversed.

B. ICWA Notice

"The ICWA is designed 'to protect the interests of the Indian child' and 'to promote the stability and security of Indian tribes and families.' It sets forth the manner in which a tribe may obtain jurisdiction over child custody proceedings involving an 'Indian child' or intervene in the state court proceedings. The notice requirements of the ICWA ensure a tribe will have 'the opportunity to assert its rights' under the statute." (*In re C.D*. (2003) 110 Cal.App.4th 214, 222, fns. omitted.) The notice requirements are strictly construed, and when proper notice is not given under the ICWA, the court's order is voidable. (*In re Karla C*. (2003) 113 Cal.App.4th 166, 174.)

By federal regulation, an ICWA notice must include, if known, the name, birthplace, and birth date of the Indian child, the name of the tribe in which the child is enrolled or may be eligible for enrollment, the names and addresses of the child's parents, grandparents, great grandparents and other identifying information, and a copy of the dependency petition. (*In re Karla C.*, *supra*, 113 Cal.App.4th at p. 175.) And most appellate courts considering the issue have held that the ICWA notice and return receipts and responses of the Bureau of Indian Affairs (BIA) or the tribe, if any, must be filed with the juvenile court. (*Id*. at pp. 175–176.)

At a May 1, 2002 hearing, Mother claimed Navajo and Cherokee heritage. She informed the court that the maternal grandmother still lived on an Indian reservation and that Mother had lived on an Indian reservation in New Mexico when she was little. The court appointed an investigator to investigate the children's American-Indian heritage and ordered DCFS to send notice to the BIA with respect to the Sioux, Navajo and Cherokee tribes. Sausha's father, Nikkolo S., informed the court in May 2002 that he had Cherokee and Blackfeet heritage, and the court ordered DCFS to send notice to those tribes.

In May 2002, Mother also informed the court that Marissa was born in Tennessee and Sausha was born in Illinois. A May 2002 DCFS report also stated that Mother was born in Illinois.

About May 7, 2002, notices on Form SOC 319 (Form 319) as to both minors were purportedly sent by certified mail to the BIA and the Cherokee and Navajo tribes with respect to the hearing on May 21, 2002.[2] The notices do not indicate to whom they were sent, and there are no proofs of service or return receipts in our record. The notices omit the minors' middle names and list a last name for Marissa which is inconsistent with the name on her birth certificate. The notices list incorrect birthplaces for the minors and Mother as Los Angeles County, California, and state that Nikkolo S. has no tribal affiliation. No notices were sent to the Sioux or Blackfeet tribes. Another set of notices was purportedly sent out about May 22, 2002, with notice of the June 24, 2002 hearing. These notices contained the same information about the minors as the May 7, 2002 notices except that the tribal affiliation for Mother was now listed as

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[2] Form 319 was promulgated by the State of California Health and Welfare Agency for the benefit of county agencies and is intended to conform with the federal guidelines notice requirements. (*In re Karla C., supra*, 113 Cal.App.4th at p. 176.) Form 319, by itself, is deficient because it does not contain a space for the names and addresses of grandparents and great grandparents and other identifying information that is known; but the deficiency may be cured if the social services agency sends the tribe Form SOC 318, which includes spaces for the additional information required by federal regulations. (*Ibid*.)

"Cherokee/Navajo/Blackfeet." No information was provided about the father listed on Marissa's birth certificate, and the birth date for Clarence G. was listed as unknown. (See fn. 1, *ante*.)

On June 6, 2002, the Eastern Oklahoma Regional Office of the BIA sent a letter to DCFS stating that BIA would forward information about the minors to the Cherokee Nation of Oklahoma and to the Eastern and Navajo Regions of the BIA, as those regions had jurisdiction of the Eastern Band of Cherokee Indians of North Carolina and the Navajo tribe. On June 11, 2002, the BIA sent a letter to the Eastern Band of Cherokee Indians (Cherokee tribe) regarding the notice received by the BIA for the May 21, 2002 hearing. The letter stated that the BIA was forwarding the notice to the Cherokee tribe for any assistance it could provide and directed the tribe to correspond directly with the caseworker at DCFS.

By letter dated June 19, 2002, the Cherokee Nation wrote to the DCFS caseworker that the Cherokee Nation had examined the tribal records and the minors could not be traced in the records through the adults listed on the notices. The letter also stated that the children will not be considered Indian children in relationship to the Cherokee Nation, but that the determination was based on the information provided and that any incorrect or omitted family documentation could invalidate the determination.

On April 8, 2003, the juvenile court found that the children were not Indian children under the ICWA.

We agree with the parties that the trial court's finding must be reversed because there was insufficient evidence of proper notice under ICWA. Not only does the record fail to contain proof that notice was sent to the tribes at issue here, but the information provided on Form 319 was incomplete and inaccurate. "[W]here, as here, there is no more than a conclusory statement in the social worker's report that notice was sent, *and* the only document that was submitted to the court is incomplete, there is no substantial compliance with either the letter or the spirit of the ICWA." (*In re Elizabeth W*. (July 21, 2004) ___ Cal.App.4th ___, ___ [2004 D.A.R. 8848, 8849].) Because the information provided in the notices was inaccurate and incomplete, we must discount the response by

the Cherokee Nation, which acknowledges that its determination would be invalid if any information was inaccurate or incomplete. The juvenile court's findings with respect to the ICWA are not supported by substantial evidence and must be reversed.

DISPOSITION

The order terminating Jamie S.'s parental rights is conditionally reversed, and the cause is remanded to the juvenile court with directions to conduct such further proceedings as are necessary to establish full compliance with the notice requirements of the Indian Child Welfare Act (ICWA). If after sending notice as required by the ICWA and no response is received indicating that either Marissa or Sausha is an Indian child within the meaning of the ICWA, the order terminating parental rights shall be immediately reinstated as to such child and further proceedings as are appropriate shall be conducted. If a tribe determines that either child is an Indian child within the meaning of the ICWA, the court shall proceed accordingly. In all other respects the order is affirmed.

NOT TO BE PUBLISHED.

MALLANO, J.

We concur:

SPENCER, P. J.

ORTEGA, J.